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No. 82-1534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE S. NEUFELD,

Petitioner

v.

BRUCE BAMBROUGH, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT, STANLEY C. VAN NESS, IN OPPOSITION TO THE PETITION

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WARREN E. SMITH, Director, New Jersey Division on Civil Rights;
JOHN J. DEGNAN, Individually and as Attorney General of New Jersey;
ROBERT A. LEONARD, Individually and as former President of Compuscan;
VERNON N. POTTER, Individually and as former Director, New Jersey Division on Civil Rights;
STANLEY C. VAN NESS, Individually and as the Public Advocate of New Jersey;
NORBERT STEINBERGER, Individually and as Executive Vice President of Compuscan;
C.Y. ALSTON, Individually and as BRANCH Manager, Paterson Office, New Jersey Division on Civil Rights;
JOSEPH H. RODRIGUEZ, as Chairman, Commission of Investigation, State of New Jersey;
MARVIN WEISS, Individually and as Vice President, Compuscan
JAMES SINCAGLIA, Individually and as Chief, Bureau of Enforcement, New Jersey Division on Civil Rights;
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JULIAN F. OLNEY, Director of Compuscan; JACOB MILLMAN, Director of Compuscan;
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GREENBERG, MARGOLIS and ZEIGLER; LEON, WEILL and MAHONEY; BESSEMER SECURITIES CORPORATION; COMPAGNIE PARTICIPATIONS et d'INVESTISSEMENTS HOLDINGS S.A. (C.P.I.H.); COMPUSCAN INCORPORATED; NEW JERSEY DIVISION ON CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY;
and UNITED JERSEY BANK.

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT, STANLEY C. VAN NESS, IN OPPOSITION TO THE PETITION

The respondent, Stanley C. Van Ness, former Public Advocate of the State of New Jersey,* respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit.

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* Respondent Stanley C. Van Ness is independently represented by the New Jersey Department of the Public Advocate. All of the other numerous state defendants in this action are represented by the Attorney General of New Jersey.

Counterstatement of the Case

Petitioner Neufeld's case concerns allegations of constitutional deprivations by respondent Stanley C. Van Ness both individually and in his former official capacity as Public Advocate of the State of New Jersey.* Petitioner asserts that respondent Van Ness and the other thirty respondents have engaged in a conspiracy to deprive him of his constitutional rights, with the federal courts ultimately denying him an appropriate hearing on these deprivations.

Petitioner filed a complaint in the United States District Court for the District of New Jersey on October 17, 1978, with an amendment filed on November 14, 1978, alleging that 31 individuals, corporations and governmental agencies had committed constitutional violations and violations of his

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* Stanley C. Van Ness formerly served as Public Advocate from 1974 to February 10, 1983, and was succeeded at that time by Joseph H. Rodriguez. Rodriguez is also a respondent in this case and is represented in his former capacity as Chairman of the State Commission on Investigation by the Attorney General of New Jersey.

civil rights under color of state law pursuant to 42 U.S.C. §1981, 1983, 1985 and 1986, 42 U.S.C. §2000e-1 et seq., 42 U.S.C. §2000d and the Fourteenth Amendment to the United States Constitution. (App164*).

As set forth in the complaint, the allegations against respondent Van Ness are as follows:

> ". . .The decision of the Public Advocate STANLEY C. VAN NESS to "not get involved" is discriminatory and similar situations challenging the Public Advocate's Decisions exist! These refusals after knowing the facts of the matter as revealed by Mr. Ray T. Falls in a letter dated October 3, 1978 "I know you intend to pursue this through FEDERAL channels and hope it will eventually be resolved to your satisfaction -- etc." clearly indicates STANLEY C. VAN NESS knew their [sic] was Jurisdiction for Constitutional violations in stating this opinion, yet VAN NESS offered no State remedy. Hence with knowledge of and as an attorney and acting as the Public Advocate under State Laws, VAN NESS refused to prevent the continuing Civil Rights Denials to Plaintiff or exert any of his powers on and for Plaintiff. The refusal to do so is alleged to be based upon arbitrary, capricious and frivolous decision making processes, for clearly the Public Advocate knew all of the issues and details from submitted documents . . ." (App209).

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* "App" refers to petitioner's appendix.

Petitioner Neufeld's initial involvement with respondent Van Ness began on June 23, 1978, when petitioner visited the Department of the Public Advocate, of which respondent is the chief executive officer, to register a complaint against the New Jersey State Division on Civil Rights. (App208). Petitioner alleged that he had attempted to file an employment discrimination complaint against his former employer, Compuscan, with the State Division on Civil Rights, but the complaint was refused. The Division on Civil Rights had determined that petitioner's complaint did not state a cause of action and that the statute of limitations for filing the complaint had tolled.

Plaintiff did not appeal this determination to the Appellate Division of the Superior Court, but instead sought the assistance of the Division of Citizen Complaints within the New Jersey Department of the Public Advocate. This office is empowered by statute, N.J.S.A. 52:27E-36, to:

> a. Receive and forward to appropriate agencies of the State for determination complaints from any citizen relating to the administrative action or inaction of agencies.

b. Investigate any complaint from any citizen relating to the administrative action or inaction of any agency, whether or not such action or inaction is final, where the complaint indicates that the action or inaction may have been:

(1) Unreasonable, unfair, oppressive or discriminatory, although in accordance with law;

(2) Unaccompanied by an adequate explanation;

(3) Performed in an inefficient manner.

Pursuant to petitioner's complaint of June 23, 1978, the Division of Citizen Complaints wrote to the Division on Civil Rights on July 1, 1978, to obtain an explanation of its refusal to accept petitioner's complaint. (App208). On July 28, 1983, petitioner wrote to the Assistant Commissioner of the Department of the Public Advocate requesting that the department file a lawsuit on his behalf through its Division of Public Interest Advocacy. The Division of Public Interest Advocacy, pursuant to N.J.S.A. 52:27E-29 et seq., may represent the public interest in any proceeding as decided by the Public Advocate. The Department of the Public Advocate wrote petitioner

and advised him that it would not initiate suit on his behalf because his case involved no significant public interest issue. Petitioner subsequently requested a reconsideration of the Public Advocate's failure to initiate litigation and was advised that this was a final decision. Petitioner did not appeal this decision to the Appellate Division of the Superior Court.

Thereafter, on October 17, 1978, the petitioner filed a lawsuit in federal district court; he alleged violation of his right to due process and equal protection of the law and sought a remedy under 42 U.S.C. §§1981, 1983 and 1985. (App208-213, App217-219, App230). Respondent Van Ness moved to dismiss petitioner's complaint. (App93-94). On February 13, 1979, arguments on the motion were heard before the Honorable Serena Perretti, United States Magistrate, to whom the matter had been referred. (App72). At the hearing, Magistrate Perretti afforded all parties the opportunity to present their positions on the issues. The magistrate established a schedule for submission of briefs by the parties,

including any reply briefs to be submitted by petitioner. (App119, App122, App153, App155).

Magistrate Perretti issued her Report and Recommendation on January 14, 1980, wherein she recommended that summary judgment be entered in favor of all defendants and against plaintiff with costs. (App6, App43). Specifically, Magistrate Perretti determined that "the complaint against all of the state defendants in their official capacities is barred by the Eleventh Amendment." (App32). With respect to the allegations against respondent Van Ness in his individual capacity, the magistrate concluded that he was immune from suit under the prosecutorial immunity doctrine. (App34).

On February 27, 1980, the Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, after considering the voluminous material submitted by plaintiff-petitioner, the Report and Recommendation of the Magistrate and plaintiff's objections thereto, entered an Order adopting the magistrate's Report and Recommendation without assessing costs. (App3).

The United States Court of Appeals for the Third Circuit subsequently affirmed the judgment of the District Court on August 4, 1982 (Appl). Petitioner now seeks a writ of certiorari seeking to reverse the Third Circuit's decision. As we will explain below, however, the petition does not present any issue worthy of this Court's attention.

REASONS FOR DENYING THE WRIT

1. CERTIORARI SHOULD BE DENIED BECAUSE THE DISTRICT COURT'S DE NOVO REVIEW OF THE MAGISTRATE'S REPORT AND RECOMMENDATION WAS IN COMPLETE ACCORD WITH THE MANDATES OF CONGRESS AND OF THIS COURT.

Respondent Van Ness adopts and joins in the argument on this issue presented in the brief by the Attorney General of New Jersey on behalf of all other respondent state officials. The Attorney General has thoroughly explained the pertinent decisions and has persuasively demonstrated why certiorari is wholly inappropriate on this issue.

2. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION THAT RESPONDENT VAN NESS IS IMMUNE FROM SUIT IN EITHER HIS OFFICIAL OR INDIVIDUAL CAPACITY IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

Petitioner challenges the magistrate's determination that respondent Van Ness was immunized from suit as conflicting with decisions of this Court concerning Eleventh Amendment immunity for state officials. Pb 22. Petitioner characterizes the magistrate's finding as granting a "blanket Eleventh Amendment Immunity," in conflict with this Court's decisions in Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979), and related decisions of this Court. (App22).

Interestingly, it is upon one of these cases that the magistrate specifically relied in determining that respondent Van Ness was immune from suit in his official capacity (App33). In Edelman v. Jordan, supra, this Court held that a suit brought in federal court by private parties would be barred by the Eleventh Amendment, if it sought to impose liability which would have to be paid

from public funds in the state treasury. 415 U.S. at 633. Quern v. Jordan, supra, one of the cases cited by the magistrate as a controlling precedent (App33), reaffirmed Edelman, and held that a suit brought on 42 U.S.C. §1983 grounds does not abrogate the Eleventh Amendment immunity of the States. 440 U.S. at 345. In Quern, the Court again reviewed the distinction between a party requesting prospective relief permitted by the Eleventh Amendment and retrospective relief, which requires the payment of funds from the state treasury and is thus barred.

The decision below is not in any way in conflict with the precedents of this Court or with this Court's interpretation of the Eleventh Amendment. Petitioner's amended complaint requests retrospective relief totalling $4,750,000 in damages, a request which undeniably seeks to require payment from public funds (App238). Eleventh Amendment immunity clearly protects the state in such suits and extends to state officials sued in their official capacity if the state is the party in fact.

Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). In the present case, the petitioner clearly seeks recompense from the state by requesting so large a sum in damages. Since the state is, therefore, the substantial party in interest, respondent Van Ness is entitled to invoke its immunity. Edelman, supra, 415 U.S. at 663. Thus, the reasoning below was consistent with this Court's precedents and properly held that the Eleventh Amendment required immunity for respondent Van Ness in his official capacity.

Petitioner mentions in his petition that he was denied declaratory and injunctive relief pursuant to 28 U.S.C. §2201 and §2202 (App22), alleging that the magistrate's holding of "blanket immunity" for state public officials was the reasoning behind this determination. (Pb 22). However, review of the magistrate's report reveals that the magistrate denied the requested relief after determining that immunity should be accorded respondent Van Ness in his individual capacity in light of his functions and responsibilities. (App34).

This decision was eminently correct in light of the unique responsibilities of the Public Advocate of New Jersey. The Public Advocate's statutory responsibility is to represent the public interest in New Jersey in such administrative or court proceedings that he deems shall serve the best interests of the public. N.J.S.A. 52:27E-29. The Public Advocate may either initiate or intervene in pending actions. N.J.S.A. 52:27E-32. Moreover, the New Jersey legislature gave the Public Advocate sole discretion to represent or refrain from representing the public interest in any proceeding, subject only to judicial review for arbitrariness through a direct appeal to the Appellate Division of New Jersey's Superior Court. N.J.S.A. 52:27E-31. Mount Laurel Twp. v. Department of the Public Advocate, 83 N.J. 522, 533, 416 A.2d 886, 892 (1980); Delaney v. Penza, 151 N.J. Super. 455, 458, 376 A.2d 1334, 1336 (App. Div. 1977).

The "public interest" is defined by statute as:

> an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.
> N.J.S.A. 52:27E-30.

The definition is expanded upon in the accompanying administrative regulations which serve to guide the Public Advocate in his evaluation of when to represent the public interest. N.J.A.C. 15A:1-1.6 discusses the decision-making process as it relates to the discretionary determination to represent the public interest:

> (a) The division may not represent the public interest without the approval of the Public Advocate. The Public Advocate shall have sole discretion to represent or refrain from representing the public interest in any proceeding.*

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* The regulations also articulate the standards the Public Advocate uses in the exercise of this broad discretion to initiate litigation. N.J.A.C. 15A:1-1.6 continues as follows:

> 1. In determining the importance of the public interest involved, the Public Advocate may consider one or all of the following:
> (Footnote continued on next page)

The Public Advocate's discretion in this regard has been challenged in state courts by individuals

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(Footnote continued from p.13)

i. Whether the issue affects the health, safety or general welfare of the citizens affected;

ii. Whether the issue concerns governmental operations at either the Federal, State, county or municiapal level which, if unresolved, will impair the quality of government services to the citizens affected; or otherwise affect the relationship of citizens to government;

iii. Whether the issue has a substantial economic impact on the citizens affected;

iv. Whether the issue has a substantial economic impact on municipal, county, State or Federal government;

v. Whether the issue may have substantial precedential value; and

vi. Whether issue otherwise substantially affects the quality of life for the citizens affected.

2. In determining the extent of the public interest involved, the Public Advocate shall consider whether the number of citizens affected in the particular action or its resolution is substantial.

(Footnote continued on next page)

whom the Public Advocate has refused to represent. Such challenges have been repeatedly rejected by

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(Footnote continued from p.14)

3. In determining whether the public interest would be adequately represented without the action of the department, the Public Advocate may consider one or all of the following:

i. Whether that interest is being fully represented by private parties; the Public Advocate may determine to become involved even if the primary parties to the dispute are represented, if such parties may not represent the full public interest in the dispute;

ii. Whether the citizens affected are members of a group, association, or political subdivision which can practically provide representation and such group representation will fully represent the public interest as well; and

iii. Whether the citizens affected have sufficient financial ability or incentive to retain competent counsel.

4. The Public Advocate may refrain from representing any public interest if it appears the cost of representation to the State substantially outweighs the public interest involved.

5. Where several public interests are involved in a single dispute or litigation, the Public Advocate may examine

(Footnote continued on next page)

New Jersey courts. See Borough of Morris Plains v. Department of the Public Advocate, 169 N.J. Super. 403, 404 A.2d 1244 (App. Div. 1979) (Public Advocate properly exercised discretion in suing 27 municipalities on the broad public interest issue of equal housing opportunities); Mount Laurel Twp. v. Department of the Public Advocate, supra (Public Advocate properly exercised discretion in denying request for reimbursement for legal expenses incurred in defense of a suit he prosecuted where representation of plaintiffs clearly served a public purpose); Delaney v. Penza, supra (Public Advocate properly exercised

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(Footnote continued from p.15)

each interest and elect to represent one interest.

6. Where there are several conflicting public interests involved in a single dispute or litigation, the Public Advocate may choose to have the division represent one interest and arrange for separate representation of the conflicting interest or interests. Alternatively, the Public Advocate may choose to refrain from representing any of the competing interests.

discretion in deciding to represent an association as plaintiffs because the pertinent statute does not restrict the Advocate's representation to individual plaintiffs); Edmond v. Department of the Public Advocate, 137 N.J. Super. 82, 347 A.2d 624 (App. Div. 1975), certif. den., 69 N.J. 455, 354 A.2d 642 (1976) (Public Advocate properly rejected request to institute action to compel the State Division of Civil Rights to reopen a case because no broad public interest issue was involved).

In this case, petitioner requested that the Public Advocate initiate a lawsuit on his behalf. The magistrate properly analogized the function performed by respondent Van Ness in such a situation to that performed by a prosecutor. A prosecutor determines whether to initiate criminal proceedings against individuals. Respondent Van Ness, similarly, has sole discretion as to whether to file a lawsuit in the public interest on petitioner's behalf. N.J.S.A. 52:27E-31. Such a function is quasi-judicial in nature, as

opposed to investigative or administrative, and this immunizes respondent from suit in accordance with Butz v. Economou, 438 U.S. 478, 515 (1978) (agency officials performing certain functions analogous to those of prosecutor can claim absolute immunity; decision to initiate proceedings is akin to the prosecutor's decision to initiate a criminal prosecution); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutor initiating prosecution and presenting the State's case is immune from a civil suit for damages under 42 U.S.C. §1983). Petitioner has not credibly argued that the magistrate's decision regarding respondent's immunity conflicts in any way with pertinent precedents of this Court.

Inasmuch as there is no conflict among circuits on the immunity issues presented by petitioner and no conflict below in lower court decisions and pertinent precedents of this Court, the petition for a writ of certiorari should be denied. No important question of national significance is presented and the decision below was

clearly correct in ruling that respondent Van Ness was immune in his individual and official capacity from suit. Additionally, little could be found in petitioner's allegations to cause them to rise to the level of a constitutional violation.

In sum, petitioner's complaint was deemed to be without merit and summary judgment was appropriately granted below. There is no basis for a grant of certiorari, or for even concluding that any alleged invasion of petitioner's constitutional rights has occurred.

CONCLUSION

For the reasons expressed herein, respondent Stanley C. Van Ness respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE OF NEW JERSEY
Stanley C. Van Ness

By: Verice M. Mason
Assistant Deputy Public Advocate

Date: April 15, 1983